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In the Supreme Court of the United States

No. .....

OCTOBER TERM, 1953.

SWITZER BROTHERS, INC., and ROBERT C. SWITZER,
Petitioners,

v.

TEXAS-MILLER HAT CORPORATION,
TEXAS-MILLER PRODUCTS, INC.,
MILLER BROTHERS HAT COMPANY, INC.,
DUNDEE SMART CLOTHES, INC.,
NATIONAL SHIRT SHOPS OF TEXAS, INC.,
NATIONAL SHIRT SHOPS OF DALLAS, INC.,
NATIONAL SHIRT SHOPS OF NORTHERN TEXAS,
Defendants,

and ARTHUR KAHN CO., INC.,
Intervenor-Defendant,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Switzer Brothers, Inc., and Robert C. Switzer, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Appeal No. 13,915 of that Court. Said judgment was entered February 13, 1953, and a petition for rehearing was denied April 23, 1953 [...e

circuit judge dissenting] (R. p. 576). A transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith in accordance with Rule 38 of this Court.

OPINIONS BELOW.

The oral opinion of the District Court (R. pp. 329-332) is reported in 91 U. S. Patents Quarterly 37. The opinion of the Court of Appeals and the dissenting opinion (R. pp. 562-568) is reported at 201 F. 2nd 824.

QUESTIONS PRESENTED.

1. Does Title 35, United States Code (enacted by Public Law 593, 82nd Congress, Second Session, entitled "An act to revise and recodify the laws relating to patents, etc.") apply to and control an adjudication of patents which had not expired prior to January 1, 1953, when such adjudication was rendered after January 1, 1953?

2. May a Court of Appeals make a finding of fact in favor of an appellant, which finding the Trial Court refused to make despite appellants' request, without citing the evidence supporting the new finding or without showing wherein the Trial Court erred in following the testimony of witnesses (including the appellants' own expert witness)?

3. Does the doctrine of collateral estoppel bar an appellant from seeking a new finding of fact by an appellate Court?

If the answer to Question 1 is affirmative and the answer to Question 2 is negative, or if the answer to Question 3 is affirmative, the following additional questions are presented:

4. May one who induced or contributed to patent infringement prior to January 1, 1953 be held liable after that date for such induced or contributory infringement under Title 35, United States Code, Section 271?

5. May one who induced or contributed to patent infringement prior to January 1, 1953 and who also acted as a surety for such infringement, be held liable for patent infringement?

6. May a patent owner, denied discovery of the extent of infringement, be denied an accounting for damages on the ground that only *de minimis* infringement was proved?

STATUTE INVOLVED.

The statute involved is Public Law 593, 82nd Congress, Chapter 950, 2nd Session, enacting, as Section 1 thereof, Title 35 of United States Code entitled "Patents." The enabling section and repealer section of said Public Law, Sections 4 and 5, are printed in an appendix to this petition, for the convenience of the Court. Also printed in the appendix are the most pertinent provisions of Title 35, United States Code, Section 100, *Definitions;* Section 101, *Inventions Patentable;* Section 271, *Infringement;* and Section 282, *Presumption of Validity; Defenses.*

STATEMENT.

On August 7, 1951, petitioners brought suit in the United States District Court for the Northern District of Texas against the several respondents named as defendants in the above caption (R. p. 14). The complaint alleged that said original defendants, manufacturers and wholesalers of apparel (Texas-Miller Hat Corporation; Texas-Miller Products, Inc. and Miller Brothers Hat Company,

Inc.), a national retailing and manufacturing chain (Dundee Smart Clothes, Inc.) and subsidiaries of a national retailing and manufacturing chain (the National Shirt Shops corporations) had all infringed claims 1 and 4 of U. S. Patent No. 2,417,384 for "Daylight Fluorescent Signal and Display Devices" and claims 1 and 2 of a later granted subsidiary patent, No. 2,450,085 for "Swimming suit" (R. pp. 68-76).

The basic Switzer patent in suit, No. 2,417,384, discloses daylight fluorescent signaling and display devices for identification and communication in military uses but also states that civilian devices may be made according to the invention. Without restriction as to either military or civilian use, the claims call for "A device for conveying intelligence visually in daylight beyond the range of subtractive [ordinary] color perceptibility, etc." The patent discloses that such devices may be made of a variety of daylight fluorescent materials, such as papers and fabrics coated with daylight fluorescent plastic coatings, daylight fluorescent dyed fabrics, etc. (R. pp. 395-399).

The accused devices introduced at trial were hunting caps, sports hats, children's jackets and bathing suits (Pl. Exhibits 31 to 35) made with daylight fluorescent dyed fabrics (R. pp. 145-149).

Respondent, Arthur Kahn Co., Inc., intervened as defendant in the suit (R. p. 34). Said intervenor was a "converter" of fabrics—"purchasing gray goods from mills, having them dyed, and selling the dyed fabrics to clothing manufacturers" (Affidavit of Kahn's attorney, R. p. 38). Prior to the suit, Kahn had agreed to indemnify the original defendants against any patent liability arising out of the use of Kahn's goods. "Upon institution of the Texas action, all of said defendants indicated that they would not defend said action except under Kahn's control

and at Kahn's expense. Kahn thereupon took over the active control and expense of defending the Texas action, and is the only interested defendant in the Texas action" (Affidavit of defendants' attorney, R. p. 36).

Prior to the trial, petitioners sought to take discovery depositions of the defendants' managing agents. Although defendants made no objection to the taking of depositions or questioned the sufficiency of notice, defendants failed to produce such agents. The trial Court refused relief to petitioners, either by striking the defendants' answers or ordering such agents of defendants to be produced at trial (R. p. 81; Appendix A attached to petitioners' main appellate brief, pp. App. 1-3).

For defendants' testimony in chief, testimony of one Durham, an attorney of record and the partner of the trial attorney (R. p. 102) was first relied upon (R. pp. 220-256). Durham testified, *inter alia*, to the effect that a certain chart he had prepared established that certain fabrics, purportedly dyed by one Seibert and one Strobl according to prior art disclosures were, in fact, daylight fluorescent fabrics. On cross examination Durham admitted that the chart was incomplete (R. p. 267). Durham also professed to have visually observed daylight fluorescent effects in a book of samples of dyed bunches of thread (Def. Ex. 32). That sample book, established to be the "personal property" of Seibert (R. p. 284), indicated on its frontispiece that it was printed in Germany in 1901 for personal use only (R. p. 249). The actual publication date, if any, or existence of copies in any public libraries anywhere in the world was not established, nor was it established when the bunches of thread observed by Durham were put in the book. Further, Durham admitted that his purported visual observations of daylight fluorescence were made *ex parte* in his hotel corridor and in a park in Dallas just before he

went on the witness stand. Durham also revealed that his vision was such during the *ex parte* observations that he saw an ordinary colored sample at a greater distance under poor lighting conditions than the distance at which he could see the same ordinary colored sample under better lighting conditions (R. p. 251).

The only other witness offered by respondents was Seibert, above referred to. Respondents also, unsuccessfully, attempted to introduce an uncertified, unsigned deposition of Strobl (R. pp. 294-299). Seibert was established to have been engaged in textile dyeing since 1907 and in charge of the duPont Technical Laboratories for twenty-three and one-half years prior to his retirement in 1949 (R. p. 272). Seibert qualified himself as an expert who was familiar with the phenomena of fluorescence, daylight fluorescence, etc., through the use of these different phenomena to differentiate and identify the dyes of fabrics sent to him for duplication. Among fabrics Seibert states he duplicated for duPont were samples of daylight fluorescent fabrics obtained from the Signal Corps shortly after Pearl Harbor (R. pp. 280-1). On re-direct examination, Seibert would not state that he obtained daylight fluorescent fabrics by following prior art; he would admit only to obtaining fluorescent fabrics (R. p. 284). Seibert testified that the practical useful value of daylight fluorescence was not recognized prior to the discovery of that phenomena by the U. S. Army Signal Corps (R. p. 283).

For petitioners, Joseph L. Switzer testified that he and his brother introduced daylight fluorescent signaling and display devices to the U. S. Army Signal Corps (R. p. 124) and testified (R. p. 132) with respect to the initial specification of the Signal Corps for daylight fluorescent signal devices (Pl. Exhibit 12). This exhibit reports a Signal Corps survey of leading firms in the field of textiles

and fluorescence (including duPont), and that, as of the date of the report (August 12, 1942, R. p. 449), a lithograph company in Cleveland, Ohio (identified as a Switzer licensee, R. p. 135) was the only source for the item, which could not be found on the open market. Switzer also testified (R. p. 135) with respect to a royalty re-negotiation agreement with the Signal Corps (Pl. Exhibit 12), under which the Signal Corps, prior to issuance of the patent in suit, paid the Switzers royalties for use during the war of daylight fluorescent devices now covered by that patent.

Switzer also testified with respect to the military uses of daylight fluorescent signaling devices (including apparel) and with respect to pictures (Pl. Exhibits 16 to 24) showing that at a distance, where a bather wearing a non-daylight fluorescent swimsuit had nearly disappeared from view, a bather wearing a daylight fluorescent swimsuit could still be seen; that at a distance, where a hunter wearing an ordinary red jacket becomes nearly invisible, the red light emitted from a daylight fluorescent hunting jacket can serve as a beacon making the wearer as visible as an adjacent bonfire; that a daylight fluorescent cap or jacket worn by a child would warn an uncoming motorist and the child would be more visible than signaling devices such as the tail-lights or stop-lights of a car adjacent the child (R. pp. 136-142).

Following testimony, the trial court immediately heard oral arguments. Respondents urged that the trial Court find that, while the invention covered by the patent in suit might extend to military devices, it could not extend to civilian daylight fluorescent wearing apparel and that, in any event, daylight fluorescent fabric was shown to be old, and thus, that the patent was invalid because it involved only an obvious use of a known fabric (R. pp. 316-319). The Court made neither finding urged by re-

spondents, but found the patent valid and infringed, granting injunctive relief against the original defendants who had made or sold infringing devices, denying recovery of damages on the ground that no proof of substantial damage had been made, and granting no relief against the intervenor Kahn who had made and sold the daylight fluorescent fabrics from which the infringing devices were made (R. pp. 329-332).

Concurrently with the litigation in the Texas District Court below, an appeal, *Marzall, Commissioner of Patents v. Switzer, et al.*, was pending in the United States Court of Appeals for the District of Columbia. This appeal was taken from the decision of the District Court for the District of Columbia in an R. S. 4915 action, authorizing the issuance of a patent on daylight fluorescent *dyed* fabrics as such (contrasted with coated fabrics, coated paper, etc., which are also useful in making daylight fluorescent devices under the patent in suit, No. 2,417,384). *Switzer et al. v. Marzall*, 94 F. Supp. 52; on motion to vacate decree for alleged new evidence, 95 F. Supp. 721; 96 F. Supp. 332 (Keech, *J.*). On the motion to consider new evidence, the Commissioner of Patents relied upon an affidavit of Strobl (the same Strobl whose deposition respondents tried to introduce in the Texas trial). The District of Columbia District Court found the affidavit insufficient and self-contradicting (96 F. Supp. 333). An attorney for Kahn sat at the counsel table with the solicitor for the Commissioner of Patents at the hearing on the motion to vacate the decree (R. p. 553). Finnegan, trial attorney for Kahn in the Texas suit below, admitted to the Court of Appeals for the Fifth Circuit that he, Finnegan, was the one who supplied the material relied upon by the Com-

missioner of Patents. Finnegan further admitted that Kahn was a prospective infringer of the patent authorized in the District of Columbia litigation. Finnegan also admitted that he had furnished the Commissioner of Patents with all the prior art relied upon by Kahn in the Texas trial below, with the hope that, in the event the appeal to the District of Columbia Court of Appeals affirmed the District Court, the Commissioner of Patents might again reject the Switzer application for daylight fluorescent fabrics as such. (Appendix B. Petitioners' main appellate brief, pp. App. 4-5).

After respondents had appealed from the decision of the Texas District Court below and petitioners cross-appealed, the Court of Appeals for the District of Columbia Circuit affirmed, on June 26, 1952, the decree of the District of Columbia District Court authorizing a Switzer patent on daylight fluorescent fabrics, as such, *Marzall v. Switzer et al.*, 199 F. (2d) 776. To the extent that any evidence before the Texas Court below was material and different from evidence of record in the District of Columbia litigation, and was deemed anticipatory of daylight fluorescent fabrics, it was the duty of the Commissioner of Patents, despite the mandate of the Court of Appeals for the District of Columbia, to again reject the Switzer application for daylight fluorescent fabrics on such further evidence, *Hoover Co. v. Coe*, 325 U. S. 79, 88. However, the Commissioner of Patents promptly issued the patent on daylight fluorescent fabrics (which Kahn had so vigorously opposed) on August 12, 1952 as U. S. Patent No. 2,606,809 (See Appendix E, petitioners' main appellate brief).

SPECIFICATION OF ERRORS TO BE URGED.

1. The majority of the Court of Appeals erred in holding that the new Patent Code did not apply to this case at the time of its decision (February 13, 1953).

2. The majority of the Court of Appeals erred in reversing the District Court's finding of validity and infringement of the patents in suit.

3. The majority of the Court of Appeals erred in not reversing the District Court's denial of damages for infringement and denial of any relief against the intervenor Kahn.

4. The Court of Appeals being advised of the intervenor Kahn's covert intervention in the District of Columbia litigation, the majority of the Court of Appeals erred in not holding that the doctrine of collateral estoppel barred Kahn from again contending that daylight fluorescent fabrics were known to the art.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals was rendered February 13, 1953. The patents in suit were unexpired patents at that time. Sub-section (a) of Section 4, the enabling section of Public Law 593, 82nd Congress, specifically provides: "This act shall take effect January 1, 1953 * * *. It shall apply to unexpired patents granted prior to such date except as otherwise provided." None of the exceptions specified in further sub-sections (b) to (h) of the enabling Section 4 support the Court of Appeals' holding that the present Patent Statutes did not apply to this case. Section 5, the repealer section of Public Law 593, refers to a schedule of Revised Statutes or Statutes at Large repealed by the Act; the Court of Appeals relied upon the sentence in this separate repealer

section which provides that: "Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

It is unnecessary to construe the statute to determine whether the exceptions to the enabling section, Section 4(a), include the separate repealer Section 5 or consist only of the specified exceptions recited in Section 4, subsections (b) to (h), inclusive. The repealed statute was simply silent on the patentability of discoveries of new uses of old materials. *Gilman v. Stern*, 114 F. 2d, 28, 29-30 [CA 2, 1940, L. Hand, *J.*]. The new statute, Sections 100 and 101, specifically provides for the patenting of discoveries of such new uses. The repealer section, § 5, of Public Law 593 simply could not apply to this case under the theory upon which the Court of Appeals decided it. Assuming, for sake of argument only, that the Court of Appeals might have been correct in finding, as a fact, that daylight fluorescent fabrics were known to the art prior to the invention of daylight fluorescent display devices covered by the issued patent in suit, the holding that "A new use for an old product is not patentable" was based on prior case law only. The new statute legislatively vacated such prior case law and must govern, even though the new statute was enacted during the appeal. *California Fruit Grower's Exchange v. Sunkist Baking Co.*, 166 F. 2d 971, 976 [CA 7, 1947, Minton, *J.*]

There is manifest substantial public interest in having an early determination of whether the legislative broadening of patents to protect discoveries of new uses for old materials applies to unexpired patents granted prior to January 1, 1953.

2. The Court of Appeals below held that:

"Moreover, all the fabrics that are made into garments and alleged to be infringed are old fabrics de-

scribed in art as far back as 1901; as such they have been available to the public." (R. p. 565.)

The Court, without specifically citing it, is apparently referring to the sample book identified as the witness Seibert's "personal property" (Def. Ex. 32, R. pp. 283-4) and the testimony of respondents' lawyer with respect to the effect of certain samples bunches of thread therein. If so, then the Court is disregarding the evidence on the frontispiece that the book was not a publication, and the absence of any evidence, whatsoever, showing when and where, if ever, that the book or the fabric samples therein were made available to the public. The Court of Appeals is also substituting its judgment of the credibility of the testimony of Durham, an attorney for respondents, for the credibility evidently given by the District Court to the contradictory effect of the testimony of respondents' own expert Seibert, the owner of the book in question. Under Rule 52, Federal Rules of Civil Procedure, it is clearly not the office of an appellate court to substitute its judgment of the credibility of witnesses for that of the trial Court.

Further, the above quoted finding by the Court of Appeals below is squarely and irreconcilably in conflict with the opinion of the Court of Appeals for the District of Columbia in *Marzall, Commissioner of Patents, v. Switzer, et al.*, 199 F. 2d 776, where that appellate court affirmed, as a matter of fact and law, that daylight fluorescent dyed fabrics, as such, were patentably novel, and authorized the issuance of another patent, No. 2,606,809 therefor; this is a patent separate and distinct from the patent in suit, No. 2,417,384, relating to daylight fluorescent devices.

Still further, respondent, during the pendency of the District of Columbia litigation over the question of the novelty of daylight fluorescent fabric, supplied the Com-

missioner of Patents with respondents' evidence before the Court of Appeals below; the Commissioner of Patents, after the decision of the Court of Appeals for the District of Columbia, promptly issued a separate patent for daylight fluorescent dyed fabrics. Thus, the Court of Appeals for the Fifth Circuit has disregarded the administrative determination (on the very same evidence) by the Commissioner of Patents that daylight fluorescent fabrics were novel and not available to the public. In doing so, the Court of Appeals below disregarded the presumption of validity of U. S. patent No. 2,606,809, a presumption expressly enacted by Congress in 35 U. S. C. 282, a provision clearly restoring administrative determinations of the Patent Office to a standing equivalent to that given to other administrative agencies.

It is a manifest matter of substantial public interest, as well as of direct interest to petitioners, that this Court (a) restate the limits to which an appellate court may go in making findings of fact refused by the trial Court without citing the evidence supporting such findings and the basis for the error, if any, in the judgment of the trial Court; (b) correct irreconcilable conflicts in the judgments, as to an identical question of fact, between two Courts of Appeal; (c) establish the weight to be given administrative determinations by the Patent Office under the new statute, 35 U. S. C. 283.

3. By erroneously holding the patents in suit invalid and not infringed and that the new Patent Code does not apply to this case, the Court of Appeals avoided a question of great public interest which it would otherwise have had to deal with, namely, the liability of those who contributorily infringed, or induced infringement of a patent now provided for in 35 U. S. C. 271. To what extent has Congress legislatively vacated the series of decisions of this

Court culminating in *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661?

4. By proceeding as a covert intervenor in the District of Columbia litigation, the intervenor Kahn failed in opposing the issuance of a patent which it would have directly infringed, as contrasted with the patent in suit, which Kahn merely contributorily infringed. That is, Kahn merely supplied daylight fluorescent dyed fabrics, covered now by Patent No. 2,606,809, which did not issue until after the appeal below had been taken. Because Kahn did not make, use, or sell daylight fluorescent devices, which may be made of various daylight fluorescent materials, Kahn only contributorily infringed the patent in suit, No. 2,417,384.

But in both the District of Columbia litigation and the Texas litigation below, Kahn's objective was the same, namely, to secure a holding that daylight fluorescent dyed fabrics were old and unpatentable. On that question, Kahn elected first to proceed in the District of Columbia courts. By participating in that litigation Kahn had his day in court. It is immaterial that party of record in the litigation in the District of Columbia whom Kahn supported with evidence and assistance of counsel was a public official, the Commissioner of Patents. The doctrine of collateral estoppel still applies. *Co-op Cab Co., et al. v. Settle, et al.*, 171 F. 2d 40 (CA 5, 1948). Under its own recognition of the doctrine of collateral estoppel, the Court of Appeals for the Fifth Circuit erred in allowing Kahn to again argue the same question which the Court of Appeals for the District of Columbia had decided.

Complicated problems have been created for coordinate courts, especially in patent cases. *Kerotest Mfg. Co. v. C-O-Two F. E. Co.*, 342 U. S. 180, 183. To protect

the adverse litigants and themselves, several Circuit Courts of Appeal have adopted the doctrine of collateral estoppel. It is respectfully submitted that substantial public interest, as well as the direct interest of petitioners, require that this Honorable Court announce and endorse the doctrine of collateral estoppel. It was apparently not enough for this Court to announce in the *Kerotest* case that a manufacturer attacking a patent has no "paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the courthouse, not a head start." (342 U. S. 185). It is respectfully submitted that the facts and circumstances in this case require a pronouncement that, in the race to the courthouse, one race is enough; it should not become an endurance contest in which the infringing manufacturer, under his own or another's colors, finally finds a forum in which he succeeds through error.

CONCLUSION.

For the foregoing reasons, it is prayed that this petition for writ of certiorari be granted.

Respectfully submitted,

ALBERT L. ELY, JR.,
Counsel for Petitioners.

APPENDIX.

Pertinent Sections of Statute Involved.

A. Public Law 593, 82nd Congress, Chapter 950, Second Session, "AN ACT to revise and codify the laws relating to patents and the Patent Office and to enact into law Title 35 of the United States Code entitled 'Patents' " (all 66 Stat. 792-817). [Section 1 (text of Title 35, United States Code), Section 2 (conforming amendment of 15 U. S. C. 1071, 1946 Trademark Act) and Section 3 (severability of Section 1) omitted].

"SEC. 4. (a) This Act shall take effect on January 1, 1953 and shall apply to all applications for patent filed on or after such date and to all patents granted on such applications. It shall apply to further proceedings on applications pending on such date and to patents granted on such applications except as otherwise provided. It shall apply to unexpired patents granted prior to such date except as otherwise provided.

(b) Section 102 (d) of Title 35, as enacted by section 1 hereof, shall not apply to existing patents and pending applications, but the law previously in effect, namely the first paragraph of R. S. 4887 (U. S. Code, title 35, sec. 32, first paragraph, 1946 ed.), shall apply to such patents and applications.

(c) Section 119, second paragraph, of Title 35 as enacted by section 1 hereof shall not apply to existing patents.

(d) The period of one year specified in section 102 (b) of Title 35 as enacted by section 1 hereof shall not apply in the case of applications filed before August 5, 1940, and patents granted on such applications, and with respect to such applications and patents, said period is two years instead of one year.

(e) Nothing contained in Title 35, as enacted by section 1 hereof, shall operate to nullify any judicial finding prior to the effective date of this Act on the

validity of any patent by a court of competent jurisdiction.

(f) Nothing in Title 35, as enacted by section 1 hereof, shall affect any provision of the Atomic Energy Act of 1946 (Aug. 1, 1946, ch. 724, 60 Stat. 755).

(g) The period of one year specified in section 4 of Title 35 as enacted by section 1 hereof shall not apply in the case of applications filed before the effective date of this Act.

(h) The repeal of sections 1-9, 11, 12 of the Act of Congress approved February 1, 1952 (ch. 4, 66 Stat. 3), shall not affect any rights or liabilities existing on the date of approval of this Act. An order of secrecy issued under or in effect under the repealed Act and in effect on the date of approval of this Act, shall be considered as issued under this Act, and any claims arising under the repealed Act or subject to presentation and determination pursuant thereto and unsettled as of the effective date of this Act, may be presented and determined pursuant to the provisions of this Act.

SEC. 5. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

[schedule of repealed statutes omitted].

B. Pertinent sections of Title 35, United States Code, as enacted by Public Law 593, 82nd Congress, Second Session.

"§ 100. Definitions

When used in this title unless the context otherwise indicates—

(a) The term "invention" means invention or discovery.

(b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

* * * * *

§ 101. Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

§ 271. Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such

patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

§ 282. Presumption of validity; defenses

A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

* * * * *

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IN THE

Supreme Court of the United States

October Term, 1953

No. 145

SWITZER BROTHERS, INC., ROBERT C. SWITZER, and JOSEPH L. SWITZER,

Petitioners,

v.

TEXAS-MILLER HAT CORPORATION, TEXAS-MILLER PRODUCTS, INC., MILLER BROTHERS HAT COMPANY, INC., DUNDEE SMART CLOTHES, INC., NATIONAL SHIRT SHOPS OF TEXAS, INC., NATIONAL SHIRT SHOPS OF DALLAS, INC., NATIONAL SHIRT SHOPS OF NORTHERN TEXAS,

Defendants,

and

ARTHUR KAHN CO., INC.,

Intervenor-Defendant,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court for the Northern District of Texas (R. 329-332) is not officially reported but may be seen at 91 U. S. P. Q. 37. The opinion of the Court of Appeals for the Fifth Circuit and the dissenting opinion (R. 562-568) are reported at 201 F. 2d 824.

Jurisdiction

The petition fails to allege that this Court has jurisdiction, nor does it contain any "statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question" (U. S. Sup. Ct. Rule 38(2), 28 U. S. C. A.). This failure to comply with the plain requirements of this Court's rules, so necessary to its orderly administration, is sufficient reason for denying the petition.

Questions Presented

Substantially none of the "Questions Presented" in the petition, pp. 2-3, arise in the instant record, and none whatsoever can be reached without reversing on a substantial number of meritorious points correctly resolved below.

Statutes Involved

Pertinent portions of the new Patent Code involved are set forth in the appendix to the petition at pp. 16-19. Printed in the Appendix to this brief, *infra*, are the section of the old statute entitled "Power of Court to grant injunctions; recovery of general damages, * * *", 35 U. S. C. (1946) 70, and the section entitled "Inventions patentable", 35 U. S. C. (1946) 31.

Statement

The petition's Statement (pp. 3-9) is a disjointed presentation so devoid of chronology, that the following is respectfully submitted for more complete understanding:

This litigation concerns the accused infringement of two patents by a handful of bathing suits, hats and a jacket (R. 301, 306, 331).

Each patent is related to articles made of fabric colored with fluorescent dyes. One, the Robert Switzer patent No. 2,417,384, is limited to "a device for conveying intelligence visually in daylight" and is entitled "Daylight Fluorescent Signalling and Display Devices" (R. 396). The other, Gantner patent No. 2,450,085, is entitled "Improvement in Swimming Suits" (R. 434). Neither of these patents in suit are drawn to the fluorescent fabric itself, but instead to "Devices" and "Swimming Suits" respectively, *i.e.*, particular articles made from the fabric. A fluorescent fabric, as such, is the subject matter of a patent (No. 2,606,809) granted on an earlier filed application to other inventors and is not directly concerned here.

Petitioners instituted the present litigation on August 7, 1951 against various clothing retailers and manufacturers, respondents here (R. 14).

Proceedings had been instituted about a year before, under R. S. 4915 in the District of Columbia, to obtain a patent (No. 2,606,809) on a fluorescent fabric *per se*, and the method of making it. The parties to that proceeding were the Commissioner of Patents and two alleged joint inventors—one Ward and one **Joseph** Switzer.* The latter

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* *Switzer et al.* v. *Marzall*, 94 F. Supp. 52 (1950).

is the brother of, and should not be confused with, the **Robert** Switzer asserted as an inventor in the case *sub judice* (R. 119). All of the proceedings in the District Court of the District of Columbia, including two post-trial motions, had been brought to a successful conclusion in that court on March 16, 1951.**

Institution of the present action did not occur until some four months thereafter, on August 7, 1951. Respondent Kahn, the supplier of some of the fluorescent fabric used by the original defendants, was granted leave by the District Court below to intervene as a party defendant on September 19, 1951 (R. 34).

In view of the court's previous denial of respondents' motion for a continuance (R. 81-86) respondents had had insufficient time to employ and instruct an expert witness in the scientific matters at issue (R. 102), and the court expressly granted respondents' reluctant request to use as an expert witness one Durham, a member of trial counsel's law firm (R. 101-102). Durham was shown to be qualified by active training and experience in the sciences of fluorescence and color phenomena (R. 220-1).

On the eve of trial, petitioners sought the discovery testimony of a particular witness concerning damages, although they had taken depositions of other witnesses in the preceding two months (R. 296-7). The District Court refused to exercise its discretion in the matter (R. 81).

At the trial, petitioners elected to prove damages and did introduce evidence of a few sales. The Trial Judge repeatedly warned petitioners of this defect in their proofs (R. 301, 304, 306, 307, 308, 309) and they fully argued their right to damages on this basis (R. 301-309).

** *Switzer et al.* v. *Marzall*, 96 F. Supp. 332 (1951).

The District Court below, on October 5, 1951, held "that there is no anticipation of this particular device for the purpose set out in certain claims of the (Robert, *sic*) Switzer patent" (R. 329). It held claims 1 and 4 of the Robert Switzer patent and claims 1 and 2 of the Gantner patent valid and infringed, granted an injunction against all of the defendants except respondent Kahn, but refused to award damages against any defendant because of failure of proof (R. 87-89 and 330-332).

On the appeal [November 24, 1952 (R. 561)], petitioners asserted (for the first time), on the basis of affidavits to support a motion for interlocutory relief, that respondent Kahn was "collaterally estopped" by virtue of an alleged participation in the two post-trial motions in the District of Columbia (R. S. 4915) proceedings involving the Ward and **Joseph** Switzer fabric patent (R. 551, 553 and Appendix to petitioners' main appellate brief, pp. 4-5).

The Court of Appeals below (Judge Strum dissenting) held both patents in suit invalid, reversed and set aside the judgment of the District Court concerning validity and infringement, and affirmed the denial of damages (R. 565).

Petitioners' request for a rehearing was denied (R. 576).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the use of old fluorescent fabric to make fluorescent garments would be obvious to any skilled artisan or experimenter. Petitioners had admitted at the outset of the trial that the inventors of the patents in suit had not invented the fabric (R. 105), so no other judicial conclusion was possible.

The "new use" section of the new Patent Code* cannot be used as a cloak to obtain a monopoly upon an ancient and obvious use of an old fabric.

Moreover the "new use" section of the new Patent Code, which the petition uses as its basic theme for invoking certiorari, is restricted to a "process, art, or method". Since absolutely none of the patent claims in suit are drawn to a process, art, or method, the effect of the new Patent Code does not possibly arise in the instant record.

It is not understandable how petitioners can assert error in the Court of Appeals' finding that the fabric as such was old, and at the same time assert the correctness of the finding of the District of Columbia courts that the fabric was the invention of two others. The fabric as such was old *to the inventors in suit,* and their "discovery" that they could make *caps, hats, etc., jackets from it* is obviously non-inventive.

The subject of contributory infringement under the new Patent Code cannot be reached without reversing the Court of Appeals' holding that caps, jackets, etc., are not signalling or display devices within the Switzer patent and thus there was no *direct* infringement; without also reversing the holding of invalidity since there can be no infringement of an invalid patent; *and* without reversing the holding that the accused hats, caps, etc. were made merely from the proven prior art.

The petition's argument of collateral estoppel must be deemed frivolous. The alleged connection with the District of Columbia proceedings is asserted only against one respondent, leaving seven respondents untouched. As to

*35 U. S. C. (1952) 100(b).

the one accused respondent, the only activities alleged in the District of Columbia *litigation* either were mere observation, or not in behalf of the respondent at all. None of the orders, judgments, or decrees of the District of Columbia courts are in the instant record.

The District Court's refusal to assist petitioners' belated attempt to take discovery testimony on the very eve of trial, and its refusal to grant a separate accounting for damages, were a proper exercise of the Court's discretion.

These, like all other points in the case, have already been adequately reviewed. Additional review by this Court is of importance solely to the litigants and presents no substantial public question justifying exercise of certiorari jurisdiction.

ARGUMENT

1. The Decision Below Is Clearly Correct.

In holding that the patents in suit were invalid for lack of invention, *i.e.*, it is obvious to make fluorescent clothing from fluorescent cloth; the Court of Appeals relied on a principle of logic so self-evident as to deny refutation. Petitioners admitted the inevitable at the very outset of the trial: "that the patent(s) covers the devices themselves and not the materials from which the device may be made" (R. 105). Patentee Robert Switzer made it clear on cross-examination that he had not invented the fluorescent fabric itself, but had merely proposed a "device for doing a particular job." (R. 192)

Judge Strum (dissenting) refused to abide by these admissions. He found a "discovery" in *the fabric* (R. 566-7).

The Court of Appeals, however, correctly held:

> "The argument that there can be no more obvious use of cloth than to make garments out of it appeals to us very much. Therefore, a patent can not be predicated upon the transferring of cloth into garments such as hats, pants, and swimming suits" (R. 565).

Even the new Patent Code, section 100(b) of which makes new uses of an old material patentable as a *process, art or method,* requires exercise of the *inventive* intellect (Petition Appendix, p. 18). The test under that Code is still one of obviousness; see sec. 103.* The "New Use" asserted by the petition could be nothing but obvious and therefore non-inventive. The very word "clothing" is derived from the word "cloth".

In any event, none of the claims in suit is for a process, art or method, and therefore could not possibly benefit from the provisions of sec. 100(b). So-called "Question 1" (petition, p. 2) simply does not arise in the record.

2. There Is No Conflict With the District of Columbia Litigation.

Reason "2", petition pp. 11-13, labors mightily to find some conflict between the holding of the Court of Appeals below, that fluorescent fabrics as such were old, and the judgment of the Court of Appeals of the District of Columbia. The latter court held the particular fluorescent fabric of **Joseph** Switzer and Ward to be patentably

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* "A patent may *not* be obtained * * * if the differences between the subject matter sought to be patentable and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." (See petition appendix, p. 18.)

novel. The petition completely ignores, and indeed somewhat conceals, the fact that the District of Columbia court was concerned with the invention of persons other than the inventors of the patent here in suit,** and that that fluorescent fabric is a particular type of fluorescent fabric and particular method of making same. The patents in suit are directed solely to making a signalling *device* or swimming suit from fluorescent coated fabric.

Even if **Joseph** Switzer and Ward had invented a new fabric, as found by the District of Columbia courts,* that fact could not make the cloth new to the inventors in suit —**Robert** Switzer and Gantner.

The Ward-Joseph Switzer patent No. 2,606,809 (Appendix to petitioners' main appellate brief, pp. 31-37) was applied for on February 13, 1942. The Robert Switzer patent in suit, No. 2,417,384 (R. 396-399), was applied for on July 16, 1943 and Gantner patent in suit, No. 2,450,085 (R. 434-436), on Feb. 24. 1947! As to the inventors in suit, the fabric was old, and had to be; otherwise they could not have "discovered" their "new uses" of it, *i.e.*, swimming suits, and signalling devices. But what could be more obvious than to make clothing from cloth?

There is no real conflict on the same matter of law or fact—each court considered a separate alleged invention made by different inventors.

** The petition identifies the District of Columbia patent only as a "Switzer patent", petition p. 9. Note that Judge Strum's error along these lines was never completely removed. Even after he corrected his dissenting opinion, the District of Columbia patent was referred to as "a similar process" showing patentability (R. p. 568).

* We do not concede the correctness of the District of Columbia decisions.

3. Contributory Infringement Not Likely To Be Reached.

The petition impliedly concedes that the question of contributory infringement is irrelevant, absent applicability of the new Patent Code. Moreover, contributory infringement cannot be reached by this Court without first reversing the meritorious holding of lack of invention by the Court of Appeals. In addition, respondents have made the normal use of a prior art fabric (R. 565). It is fundamental that one cannot infringe by following the prior art.

Further, the Court of Appeals' holding on *direct* infringement would have to be reversed. On this, the Court correctly held that "the patents have not been infringed, because to call a hat, coat, sweater, bathing suit or any other garment worn by a child, a signalling device is unreasonable and threatens the validity of the patent" (R. 564-5).

Consideration of the effect of the new Patent Code on the doctrine of contributory infringement is not appropriate in the instant case.

4. There Is No Collateral Estoppel.

The petition asserts that activities by agents allegedly in behalf of respondent Kahn in the District of Columbia R. S. 4915 proceedings during the two post-trial motions in the District Court worked a collateral estoppel in the case *sub-judice* on appeal (petition pp. 12-3, 14). It should be noted that no activities on behalf of respondent Kahn are alleged to have occurred during the District of Co-

lumbia trial or appeal proceedings themselves. Only the two post-trial motions and the supplying of additional prior art to the Commissioner pending the decision of the Appellate Court are even alleged.

When one actually examines the record references relied upon by petitioners to support their extravagant charges that Kahn was a "covert intervenor" in the District of Columbia proceedings (petition, p. 14), that he "elected first to proceed" there (petition, p. 14), that he "had his day in court" there (petition, p. 14) and that he conducted an "endurance contest" to "find a forum, etc." (petition, p. 15), the entire accusation proves nebulous.

During the first District of Columbia post-trial motion by the Commissioner of Patents*, one Landau (Kahn's general counsel) sat at the Commissioner's counsel table (R. p. 553), but Landau's sedentary position is a far cry from the active degree of participation required uniformly by the courts of the land as a requisite to collateral estoppel or *res adjudicata*. Moreover, the opinion of the court* shows that it merely dismissed for lack of jurisdiction!

Before the second motion,** Finnegan, of counsel in the present case, called the Commissioner's attention to prior art not known to the Commissioner at the time of the trial, but the very record reference relied on by petitioners shows Finnegan was acting as counsel *for a client other than Kahn*, and that at that time he "did not and never

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* Motion to Vacate the Decree to Consider Newly Discovered Evidence, *Switzer* v. *Marzall*, 95 F. Supp. 721 (1951).

** Motion to Request Remand in View of Newly Discovered Evidence, *Switzer* v. *Marzall*, 96 F. Supp. 332 (1951).

had represented the Kahn Company" (Appendix B, petitioner's main appellate brief, pp. 4-5).

The same identical record reference shows that it wasn't until over six months later (after Oct. 5, 1951) that Finnegan brought more prior art to the attention of the Commissioner, but this time on behalf of Kahn. (Same appendix, p. 5.) The District of Columbia appeal decision was then pending, no further proceedings were had, and the proferred prior art never got into the District of Columbia case *at all.* No possible estoppel could attach. There never was an adjudication of that art in that Court, nor was the art offered to the Court.

Nevertheless, the petition, pp. 8-9, 14, lumps all of the above unrelated events together in a highly congealed and hopelessly intertwined mass of half-truths and gratuitous assertions, unsupported by either fact or record evidence, as a predicate for grave belated accusations. Inference that it is frivolous must be inevitable.

Note that the findings of fact, judgments, orders, etc., and the record itself in the District of Columbia proceedings are not in the record before this Court. It is axiomatic that collateral estoppel here could stem only from an adjudication of a common issue of fact or law. The facts can only be a matter of conjecture for this Court.

5. The Finding of Fact by the Court of Appeals Was Proper.

The petition asserts repeatedly that the Court of Appeals erred in finding that daylight fluorescent fabrics, as such, making up the accused garments, were old (R. 565) because the District Court had "refused" to make such a finding (pp. 12-13). However, the District Court made no

finding on this issue whatsoever. Its "refusal", if it can be called that, arose from its complete disregard of the issue. It merely found that "there is no anticipation of this particular device *for the purpose* set out in certain claims of the Switzer patent" (R. 329). If anything the District Court implied that the fabric was old and the Court of Appeals so noted.*

The prior art evidence concerning the fluorescent fabric itself was largely *uncontroverted,* and credibility of witnesses was *not* involved.

Defendant's Exhibits 3, 4, 5, 8, 14, 38, 39 and 40 were fabrics dyed in accordance with prior art patents and publications Defendant's Exhibits 27, 41 and 42 (R. 521-523, 530-540), by witness Seibert (R. 273-279). Seibert's unchallenged qualifications for this work are listed at page 6 of the petition. *All* of these prior art fabrics met the color requirements of the patent claims *as fully admitted by petitioners' expert witness Joseph Switzer* (R. 174-178).

In addition, General Electric scientist Fonda's 1936 publication (D. Ex. 22, R. 493) states, in plain English, the daylight fluorescence of the very dye on the very material specified in the patents (R. 232-235). There was *no* opposition to this printed publication and it could be reviewed fully by the Court of Appeals without dependence on or review of any oral testimony.

Also, Defendant's Ex. 32, R. pp. 283-4, is a volume of dyed fabric samples entitled "The Aniline Colours of the Badische Aniline & Soda Fabrik, 1901" (R. p. 249). Wit-

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* "The gist of the (District) Court's holding was that the allegedly new use of the fabric in clothing (not the fabric itself) was the vitalizing element of patentability." (R. p. 564)

ness Durham's testimony on its anticipating characteristics (R. 251-2) was not controverted.*

Absent a finding on the admitted and unopposed proofs of antiquity of the fabric, the Court of Appeals properly made its own finding, thereby saving the parties and the courts the expense and inconvenience of a remand. The "facts are little in dispute", if at all, and this Court has previously announced the right of a reviewing court to make its own findings in such circumstances. *Great Atlantic & Pacific Tea Co.* v. *Supermarket,* 340 U. S. 147, 152-4 (1950). See also *United States* v. *United States Gypsum Co.,* 333 U. S. 314, 395 (1948).

Review by this Court on the issue of fact findings could serve no important public purpose.

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* Seibert's statement that the "*practical* useful value" of fluorescent fabric was first recognized by the Signal Corps (R. 283, and petition p. 6) of course is not contradictory.

The petition's only attack on this fluorescent sample book (D. Ex. 32) is that the book was not a "publication" but instead witness Seibert's "personal property", petition pp. 5 and 12. The testimony of Seibert "evidently" relied on by the District Court and allegedly ignored by the Court of Appeals (according to the petition p. 12) actually supports the latter's finding and shows how petitioners have quoted Seibert's testimony out of context. Seibert stated: "it is my personal property *now*", that he had the book "since about 1909 or 1910", that it was used in his work for DuPont and the Continental Color and Chemical Co., that it was "up on our desks, available to all of the technicians that required (it)", and "was a well known book in the dye industry at the time" (R. p. 284). Seibert's work with Continental was from 1907 to about 1925 and immediately thereafter with DuPont (R. p. 272). Therefore, petitioners' argument (pp. 5 and 12) that the sample book was not a "publication" "available in public libraries" is irrelevant. At the very least, it proves anticipating fabrics were known or used by persons in this country *other than* the inventors, years before the invention and decades before the applications were filed (1943 and 1947).

6. The New Patent Act Does Not Apply to the Instant Case.

In asserting applicability of the new Patent Code to the case *sub judice,* the petition relies solely on enabling section 4(a) thereof (petition pp. 10-11, 13-4) which provides for an effective date of January 1, 1953.

Filing of the complaint, trial and adjudication therein, docketing of the appeal, and argument of the appeal, *all* occurred below prior to January 1, 1953. The fact that the Court of Appeals decision was not announced until after January 1, 1953, *i.e.,* February 13, 1953 could in no way retroactively graft this new statute onto the prior rights and liabilities of the parties since the repealer and saving section thereof expressly precludes it.* The Court of Appeals below so held (R. 565).

The petition asserts (p. 11) that the "repealer and saving clause" (section 5) does not apply to the present case on the theory that that section solely preserves prior rights and liabilities expressly spelled out in the repealed statutes while nevertheless abolishing ~~of rights and liabilities existing in~~ the case law construing those same statutes [*e. g.,* subject matter not patentable under R. S. 4886, 35 U. S. C. (1946) 31,** such as "new uses", in the instant case]. This overly technical construction imputes an intent to the Congress to make an artificial distinction reducing section 5 to an empty gesture. The "saved" rights and liabilities would be devoid of form and character, since the great body of prior rights and liabilities "under" the repealed statutes existed and received enforceable sustenance only in the case law.

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* "Sec. 5. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing *under* such sections or parts thereof shall not be affected by this repeal."

** Appendix to this brief, page 18, *infra.*

In addition to the Fifth Circuit decision below, petitioners' theory has been rejected in the Sixth Circuit. *General Motors* v. *Estate Stove,* 201 F. 2d 645 (C. A. 6th 1953).

See also the First Circuit and Third Circuit decisions of *Carlson & Sullivan* v. *Bigelow,* 202 F. 2d 654 (C. A. 1st, March 19, 1953) and *Stanley Works* v. *Rockwell,* 203 F. 2d 846 (C. A. 3rd, April 13, 1953), where the new Code was held not applicable on appeal. *Cf. New Wrinkle* v. *Watson,* —— F. 2d ——, 96 U. S. P. Q. 436 (App. D. C., March 19, 1953).

California Fruit Growers v. *Sunkist,* 106 F. 2d 971, 976 (C. A. 7th 1947) (petition p. 11) is obviously distinguishable. There the parties conceded the applicability of the new statute involved (see p. 973). The sole question was the statutory changes themselves, not their applicability.

There is no conflict among the lower federal courts concerning applicability of the new Patent Code in a case after appeal has been perfected; the question has been sufficiently settled, and review by this Court could serve no important public purpose.

7. Accounting for Damages

The trial court's refusal to entertain petitioners' belated attempt to secure discovery testimony on the very eve of trial was an act of discretion already reviewed below.

Petitioners refused to abide by the warnings (R. 301, 304, 306, 307, 309), of the District Court that it would not grant a separate (and necessarily expensive) accounting for damages unless petitioners proved more than trivial damages, *i. e.,* a handful of bathing suits, hats and a jacket.

The pertinent section of the controlling statute clearly made the matter discretionary to the trial court:

> "The court shall assess said damages, *or* cause the same to be assessed, under its direction * * *" 35 U. S. C. (1946) 70.*

Usually accountings are deferred to settle more expeditiously the paramount question of patent validity and infringement. Nevertheless, the matter is one involving the convenience and facilities of the trial court and is therefore peculiar to its discretion. Any abuse of that discretion here is important to no one other than the instant litigants and has been adequately reviewed by the Court of Appeals below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

July 22, 1953.

Respectfully submitted,

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* Appendix to this brief, p. 18, *infra*.

APPENDIX

Pertinent Statutes

"R. S. 4886, 35 U. S. C. (1946) 31. **Inventions patentable**

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

"R. S. 4921, 35 U. S. C. (1946) 70. **Power of court to grant injunctions; recovery of general damages; assessment; elements of general damages; increase of damages; limitations; notice to commissioner of suits and judgments rendered**

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The court shall assess said damages, or cause the same to be assessed, under its direction and shall have the same power to increase the assessed damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case; but recovery shall not be had for any infringement committed more than six years prior to the filing of the complaint in the action."

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